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In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER,

v.

LEATHERMAN TOOL GROUP, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

What is the standard of review of a trial court's ruling on a challenge to the constitutionality of a punitive damage award?

PARTIES TO THE PROCEEDING

Cooper Industries, Inc. is the only petitioner in this proceeding. Petitioner certifies pursuant to Supreme Court Rule 29.6 that it has no parent corporation nor are there any publicly held companies owning 10% or more of its stock.

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In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER,

v.

LEATHERMAN TOOL GROUP, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Ninth Circuit simultaneously issued two opinions—one published (Pet. App. 6a-17a),[1] and one unpublished (Pet. App. 1a-5a)—in resolving the case below. The published opinion is reported at 199 F.3d 1009. The district court's judgment (Pet. App. 19a-26a) and post-verdict Order denying Petitioner's motion for judgment as a matter of law (Pet. App. 27a-31a) are unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decisions on December 17, 1999. The court denied Petitioner's timely petition for rehearing/rehearing en banc on March 3, 2000. (Pet. App. 18a). After seeking and receiving from Justice O'Connor an

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[1] "Pet. App." refers to the Appendix in the Petition for a Writ of Certiorari.

extension of time in which to file a petition for a writ of certiorari, Petitioner timely filed its petition on June 20, 2000. This Court granted certiorari on October 10, 2000, and now has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Due Process Clause of the Fifth Amendment provides, in relevant part: "No person shall be . . . deprived of . . . property, without due process of law." U.S. CONST. amend. V.

The Reexamination Clause of the Seventh Amendment provides: "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

STATEMENT OF THE CASE

Both Petitioner Cooper Industries, Inc. ("Cooper") and Respondent Leatherman Tool Group, Inc. ("Leatherman") are tool manufacturers. In the early 1980s, Leatherman developed and began to market a multi-function hand tool denominated the Pocket Survival Tool ("PST"). Although Leatherman has sold millions of these item over the last two decades, it has never received a patent for the device.

In 1995, Cooper sought to develop a similar product in an attempt to compete with the PST in the hand tool market. (ER 1081-83; Tr. 865-68).[2] In this endeavor, Cooper, as it is legally entitled to do, (Pet. App. 16a), largely copied the basic functional design of the PST, albeit with several modifications, including the additions of a serrated knife, a locking mechanism, and removable fasteners. (ER 326-28).

[2] "Tr." refers to the trial transcript. "ER" refers to the Excerpt of Record in the Ninth Circuit.

Early in the development stage, Cooper constructed a mock-up of its new tool, which it ultimately named a "ToolZall," for initial layouts in advertisements. (Tr. 947-48). At that time—approximately June or July of 1996—the first of Cooper's new tools had not yet rolled off the production line. (ER 688; Tr. 948.) Cooper's brand manager on the ToolZall project thus instructed employees at the company's plant to put together a prototype for advertising purposes. (ER 688).

An engineer at Cooper's plant assembled the ToolZall prototype by modifying the substantially similar looking Leatherman PST. (ER 688-89). In particular, Cooper's unique fasteners were placed on a PST and all designating Leatherman marks were removed. (ER 337, 705). Testimony revealed, and the Ninth Circuit explicitly held, that the visual distinctions between the photographed ToolZall mock-up and the Leatherman PST are virtually imperceptible. (App. 3a).[3]

Cooper formally introduced its ToolZall product at the National Hardware Show in August 1996. (Tr. 886). At this event, Cooper used the mock-up photographs in its advertisements, press kits, packaging, and other disseminated materials. (ER 623-26). Cooper also employed the same photos in promotional materials sent to various magazines and mail-order catalogs. (ER 626).

While attending the 1996 hardware show, Leatherman co-founder and president Tim Leatherman carefully examined the ToolZall mock-up photographs posted in the Cooper booth and discerned a similarity between the pictured Cooper tool and the Leatherman PST. (Tr. 99-100). After the show, he saw the same photographs in magazine and catalog advertisements as well as on the ToolZall package itself. (Tr. 104).

[3] Juxtaposed photographs of the ToolZall prototype and PST are included on page seven of Cooper's opening brief in the Ninth Circuit.

In September 1996, Leatherman filed the instant action against Cooper in the United States District Court for the District of Oregon. The complaint included a Lanham Act trade dress infringement claim and common law causes of action for unfair competition, false advertising, and "passing off."[4] In addition to damages, Leatherman sought an injunction against (i) the manufacture and sale of the ToolZall, and (ii) any further use of the modified PST in ToolZall advertising. (Pet. App. 32a).

Upon service of Leatherman's suit, Cooper acknowledged its use of a modified PST in company advertisements and voluntarily withdrew its ToolZall from the domestic market in the middle of October 1996. (Tr. 733). It further sent written notice to its sales personnel on November 20, 1996, ordering the recall of all ToolZall promotional materials bearing photographs of the modified PST. (ER 1070). Cooper then entered into a "Stipulated Order for Preliminary Injunction with Respect to Advertising," which the district judge promptly signed on December 20, 1996. (J.A. 12-13). The Order enjoined Cooper from using any photograph of a Leatherman tool, modified or otherwise, in ToolZall advertising or packaging. (*Id.*).

Contemporaneous with its issuance of the advertising injunction, the court, concluding that Leatherman had demonstrated a likelihood of success on its trade dress infringement claim, entered a separate preliminary injunction barring Cooper from conducting any additional sales of its ToolZall product in the United States pending the outcome of the litigation.[5] (Pet. App. 44a). In combination, the October 1996 voluntary withdrawal and December 1996 preliminary injunction kept Cooper from selling a single original ToolZall in the United States after October 1996.[6] (Tr. 1061-62).

[4] The complaint also contained a copyright infringement claim. Prior to trial, the parties stipulated to an entry of judgment against Cooper on this cause of action after agreeing that Leatherman had suffered no damages in connection with the infringement. (J.A. 10-11). No evidence was presented to the jury on this cause of action nor did the jury consider any of the allegations related thereto in its deliberations. (*Id.*).

In 1997, despite both the advertising injunction and written directive to its sales personnel, it was brought to Cooper's attention that photographs of the modified PST were still appearing periodically in ToolZall ads in various catalogs and magazines. (Tr. 367-69). Upon being alerted to this situation, Cooper sent a letter on April 24, 1997, to all of its domestic resellers/distributors,[7] ordering that any outstanding promotional materials depicting a modified PST be returned to the company immediately. (Tr. 906-08). In practical terms, none of the recalled advertisements resulted in any revenue to Cooper (or harm to Leatherman) inasmuch as Cooper was under an injunction barring it from selling the ToolZall and, in fact, had removed the item from the market in October 1996. (Tr. 898).

Leatherman's lawsuit proceeded to trial in October 1997. Based on testimony from Leatherman's experts, the court instructed jurors that the damages, if any, flowing from Cooper's allegedly unlawful activities were roughly equivalent to Cooper's profits on the original ToolZall. (Tr. 701-

[5] The district court later issued a permanent injunction enjoining Cooper from selling its original ToolZall within the United States.

[6] Cooper introduced a new ToolZall in 1997 that was highly dissimilar to the PST. No advertisements using a modified PST appeared for the new ToolZall. (Tr. 1061-62). Although Leatherman amended its complaint to allege that the new ToolZall also infringed on its trade dress rights, that claim was flatly rejected by the jury. (J.A. 16). There has never been any serious suggestion that consumers viewing the new ToolZall would have confused the device for a PST.

[7] Cooper sells its products through resale distribution channels, rather than by direct sales to end-user consumers. (Tr. 936-37).

02; Instruction 36). According to Cooper's expert witness, Creighton Hoffman, whose testimony the jury apparently accepted, Cooper's gross profits from nationwide ToolZall sales approximated $50,000. (J.A. 24). No attempt was made by either Leatherman or its experts to segregate damages on the trade dress infringement claim from damages on the common law false advertising/"passing off" causes of action.

On October 17, 1997, the jury returned a verdict concluding that Cooper's original ToolZall infringed Leatherman's trade dress rights in the PST, but that Leatherman had suffered no damages from the infringement. (J.A. 15-16). The jury further determined that Cooper had engaged in common law unfair competition, passing off, and false advertising, causing Leatherman $50,000 in damages. (J.A. 17). The jury then imposed $4.5 million in punitive damages against Cooper on the common law claims after finding that Cooper's false advertising/passing off was malicious. (J.A. 18).

Cooper filed a timely post-trial motion in which it requested, amongst other relief, a reduction of the punitive damage award as a matter of law. Cooper argued, *inter alia*, that, because it suspended all sales of the original ToolZall after October 1996, its ads could not have had more than the most minimal impact on Leatherman's revenues. Cooper also emphasized that, since the visual distinctions between the genuine ToolZall and the modified PST appearing in the Cooper advertisements were virtually undetectable, the ads could not possibly have had *any* effect on Leatherman's reputation among consumers. Finally, Cooper maintained that a punitive damage award that was ninety times the amount of the purely economic compensatory damages purportedly suffered by Leatherman violated Cooper's due process rights, as set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

In its abbreviated entry of judgment issued November 17, 1997, the district court denied Cooper's motion to reduce the punitive damage award. (Pet. App. 24a). Its perfunctory treatment of the *Gore* issue yielded no more than this single conclusory statement: "I find that the award is fairly proportional given both the nature of the conduct, evidence of intentional use of the modified [PST] and the size of an award necessary to deter future similar conduct given defendant's size and assets." (Pet. App. 24a). In a subsequent order denying Cooper's formal motion for judgment as a matter of law, the court also refused to reduce the punitive damages pursuant to Oregon law. (Pet. App. 29a-31a).

Cooper appealed. The Ninth Circuit, in a published opinion, reversed the district court verdict on the trade dress infringement claim and vacated the injunction. (Pet. App. 6a-17a). It held that the design of the unpatented PST was entirely "functional" and, therefore, not protectable trade dress. (Pet. App. 10a) ("[T]he physical details and design of a product may be protected under the trademark laws only if they are nonfunctional.").

At the same time, in a separate unpublished opinion, the Ninth Circuit affirmed the jury's verdict on liability and damages as to the common law claims. (Pet. App. 1a-5a). Although expressly acknowledging that Cooper's false advertising was highly "unusual" in that no consumers could have been deceived by the company's conduct, (Pet. App. 3a), the court below nonetheless held that Cooper's actions amounted to "literal passing off." (Pet. App. 3a-4a). This "literal passing off," in the circuit's view, may have given Cooper an unfair advantage by allowing it to obtain a mock-up photograph of its ToolZall more quickly than if it had started from scratch or waited until the genuine ToolZall had come off the production line. (Pet. App. 4a). Notwithstanding the district court's observation that Cooper's post-injunction ToolZall advertisements were at least "arguably inadvertent," (Pet. App. 31a), the Ninth Circuit added that Cooper's failure to remedy the problem after an injunction

had issued suggested "an indifference to legal consequences." (Pet. App. 4a).

With respect to the punitive damages due process issue, the Ninth Circuit, applying a deferential standard of review, held the district court did not abuse its discretion in refusing to reduce punitive damages. (Pet. App. 3a-4a). This petition for certiorari followed.

SUMMARY OF THE ARGUMENT

In *Gore*, this Court admonished that "grossly excessive" punitive damage awards run afoul of the Due Process Clause of the Constitution. The majority there identified several legal guideposts for ascertaining whether the constitutional "gross excessiveness" threshold has been crossed. Federal circuits have since divided, however, over whether, in reviewing a district court's gross excessiveness determination, the standard of review on appeal is *de novo* or "abuse of discretion."

All available jurisprudential indicia point to the former and away from the latter. Indeed, the Court has held definitively that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice, not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. No such "fair notice" emerges from a review standard that is both solicitous of, and deferential to, the trial judge's exercise of discretion.

It is not surprising that the *Gore* guideposts—*i.e.*, the misconduct's relative reprehensibility, the relationship between the jury's compensatory and punitive awards, and the comparison of analogous civil and criminal penalties—focus away from discretionary-grounded determinations. *Gore*, instead, calls for an inquiry that is essentially legal in nature (not fact-bound) and revolves around matters that the jury neither considered nor should have considered in its deliberations.

Traditionally, appellate courts have been regarded as best positioned to grapple with, and answer, such legal questions. *Salve Regina College v. Russell*, 499 U.S. 225, 231-32 (1991). Precisely because the issue to be decided calls for no separate fact finding, but involves only the application of *established* facts to governing legal principles, the deliberation process on appeal is plenary. *See United States v. First City Natl' Bank*, 386 U.S. 361, 368 (1967).

Here, of course, the measurement of whether a punitive damage award is grossly excessive is of *constitutional* importance. This Court has been resolute in its insistence that appellate court review of constitutional claims rooted in the Bill of Rights be undertaken *de novo*. *See, e.g., Haynes v. Washington*, 373 U.S. 503, 515 (1963) (speaking of independent appellate review in the context of examining Due Process Clause claims as nothing less than a "duty of constitutional adjudication"). Independent appellate review has been adjudged essential in such circumstances "if appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas v. United States*, 517 U.S. 690, 698 (1996).

Most constitutional issues -- due process attacks on the excessiveness of punitive damage awards in particular -- acquire context only through application. As the "expositor of law" on such questions, *Miller v. Fenton*, 474 U.S. 104, 114 (1985), appellate courts are able to clarify and give efficacy to the governing jurisprudence only by uniformly applying a meaningful standard of review to the full array of factual scenarios. By contrast, a review standard that unduly accords deference to the trial court's discretion "invites divergent development of [constitutional] law among the federal trial courts," *Salve Regina College*, 499 U.S. at 234, promising to foster significantly disparate constitutional boundaries in every jurisdiction.

Accordingly, constitutional excessiveness challenges to punitive damage awards must undergo independent, *de*

novo appellate review if the Due Process Clause is to function effectively as a bulwark against wholly arbitrary or irrational awards. Petitioner does not suggest, nor is it constitutionally required, that appellate courts must somehow divine the exact amount of punitive damages necessary to punish and deter a defendant's misconduct. But their dispassionate application of the constitutional standards governing punitive damages, accentuated by an acute awareness of similarly situated appellate courts' treatment of the issue, will, over time, develop a cogent body of law that promulgates an environment of predictability and reasonableness. In this way alone can the "fair notice" principle embodied in the Due Process Clause be meaningfully served.

Finally, requiring *de novo* review of the due process question at issue here poses no problem under the Reexamination Clause of the Seventh Amendment. The constitutional excessiveness probe undertaken by the court of appeals entails no reexamination of any jury fact findings. The circuit is, instead, determining whether the punitive damage award is excessive *as a matter of law* and, in so doing, is identifying that portion of the award (if any) that constitutes unlawful excess. The issue is purely legal and, therefore, does not intrude on any traditional function of the jury that might require a more deferential standard of review under the Reexamination Clause. *Cf. Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996) (dealing with appellate review of compensatory, not punitive, damages).

ARGUMENT

I. The Question of Constitutional Excessiveness of Punitive Damage Awards Must Be Accorded Independent Appellate Review

This Court has embraced a substantive due process limitation on "grossly excessive" punitive damage awards. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO*

Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) (plurality); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). As expressed in *Gore*, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. In recognition of the fact that punitive damages present an acute risk of arbitrary deprivation of property, *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994), the Court's majority has identified several guideposts for assessing gross excessiveness. *Gore*, 517 U.S. at 575-84. Federal courts of appeals have divided, however, over the proper standard of review for evaluating district court determinations on this constitutional issue.

This case brings that division to the Supreme Court for resolution. As with appeals arising under virtually every other provision in the Constitution's Bill of Rights, so too here, a *de novo* review standard operates as the only effective safeguard against an award of constitutionally excessive punitive damages. The abuse of discretion standard employed by the Ninth Circuit below is wholly inadequate to the task. It calls upon appellate courts not to evaluate the *Gore* factors based on independent analysis and judgment, but to defer largely to trial judges who are, for the most part, less experienced and adept at handling the requisite legal questions. Such deferential review brings neither rationality nor predictability to the constitutional inquiry and, as is evident here, invites appellate courts to maintain only the most illusory sensitivity to the Supreme Court's due process jurisprudence in the punitive damages context.[8]

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[8] In the instant case, the Ninth Circuit's "review" of Petitioner's constitutional challenge to the punitive award was so expansively deferential to the district court's ruling that it effectively short-circuited any meaningful application of the *Gore* factors. Indeed, from all appearances, the only factor the court considered on the excessiveness issue was Petitioner's

(footnote continued on next page)

A. Meaningful Constraints On Punitive Damage Awards Need Discernible Parameters That Can Only Come With *De Novo* Appellate Review

Justice Kennedy observed in his *TXO Production Corp.* concurrence that the inquiry into gross excessiveness of a punitive damage award is meaningless without some fixed beacon to mark the boundaries of reasonableness. 509 U.S. at 466 ("To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what?"). The guideposts established in *Gore*—*i.e.*, the degree of reprehensibility of the defendant's misconduct, the relationship between the punitive award and the actual or potential harm suffered by the plaintiff, and the similarities and distinctions between the punitive award and comparable civil or criminal sanctions, 517 U.S. at 574-84—were designed to focus this constitutional analysis.

More to the point, adoption of these factors reflected an acknowledgement of the constitutional necessity for some objective indicia against which to discern the permissible scope of punitive damage awards. While eschewing any strict "test" or talismanic formula in *TXO Production Corp.*, 509 U.S. at 457-58, the Court there recognized that a defendant's right to notice as to the severity of the penalty to which he may be exposed cannot be predicated on constitutional limits entrusted solely to the discretion of individual decisionmakers. Inescapably, one person's "excess very well may be another's moderation." *Id.* at 481 (O'Connor, J., dissenting).

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wealth, the relevancy of which has heretofore been seriously questioned by this Court. *See Gore*, 517 U.S. at 591 (Breyer, J., concurring); *Haslip*, 499 U.S. at 22. Thus, the Ninth Circuit's constitutional evaluation cannot survive scrutiny under any standard of review.

The *Gore* guideposts are of little utility if their application is not subjected to rigorous appellate review. Without binding appellate precedent, neither jurors nor trial judges have a frame of meaningful reference for gauging the magnitude of a defendant's blameworthiness. Punitive damage awards tend to fluctuate erratically principally because, while moral judgments are widely shared, the "mapping [of those] judgments onto an unbounded scale of dollars" defies consistency. Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2074 (1998). As empirical studies have demonstrated overwhelmingly, the natural consequence of this difficulty in translating abstract emotion into monetary figures is wildly unpredictable and arbitrary punitive awards.[9] *Id.* In short, similarly-situated defendants are not treated similarly.

As human beings, judges are equally susceptible to these cognitive biases. Judges, nonetheless, generally overcome the psychological impediments by working "within a discipline and hierarchical organization that . . . promotes roughly uniform interpretation and application of the law." *Gore*, 517 U.S. at 596 (Breyer, J., concurring). Yet, if trial judges' determinations of constitutional excessiveness are not channeled by some controlling parameters established by an appellate court, there is no "discipline" or "hierarchical organization" to effectuate the uniform application of law. There is simply the placement of a judicial imprimatur on the jury's capricious verdict, effectively sanctioning a conversion of rational outrage into an irrational award. *See* David Schkade et al., *Empirical Study: Deliberating About Dollars:*

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[9] The Brief Amicus Curiae of Certain Leading Business Corporations contains a more detailed discussion of these scientific studies.

The Severity Shift, 100 Colum. L. Rev. 1139, 1142-49 (2000).[10]

In this regard, it is critical that the *Gore* guideposts all involve determinations that are (i) essentially legal in nature and (ii) transcend anything the jury considered, or should have considered, in reaching its verdict.[11] The comparison, for example, between the punitive damage award and other civil or criminal sanctions calls for an assessment of the nexus between the punishment imposed by the jury and similar punishments available under law. Both the identification of analogous statutes and penalties and the interpretation of those applicable provisions are quintessential legal issues. Neither disputed nor historical facts are part of the analysis.

Similarly, the *Gore* focus on the ratio between the punitive and compensatory damage awards seeks to isolate a benchmark of constitutionality based on awards that have survived gross excessiveness scrutiny in other cases. While there is no precise mathematical formula, this component of the analysis probes whether the disparity between the punitive and actual damages is so substantial as to fall outside a

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[10] The absence of consistency also conceivably erodes the basic purposes of tort law, which are to compensate victims fairly for their injuries and losses, to allocate and spread the risk of the costs of those injuries, and to deter misconduct. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 4, at 20-26 (5th ed. 1984). Erratic and irrational verdicts, if sustained, nurture a socially divisive environment of overdeterrence and "excessive precautionary measures." A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 955 (1998). Notions of proportionality are progressively obscured.

[11] For a more detailed discussion of the unique roles played by juries and judges in the calculation and examination of punitive damage awards, *see* Part I.A. of the United States Chamber of Commerce's Brief Amicus Curiae.

"constitutionally acceptable range." *Gore*, 517 U.S. at 583. The comparative inquiry is predominantly legal in nature and relies almost entirely on matters outside the record for its resolution.

The same is true with respect to the final factor identified in *Gore*—*i.e.*, the degree of reprehensibility of the defendant's conduct. The court here is not assessing whether the defendant acted maliciously. That threshold finding was presumably made by the jury as a condition precedent to the award of *any* exemplary damages, *see* J.A. 14 (instruction on punitive damages), and it is not to be disturbed if there is sufficient evidence in the record to support it.[12] What the "reprehensibility" factor examines is the proper placement of the defendant's misconduct along a continuum of blameworthiness. *See id.* at 576-80 (describing relative degrees of reprehensibility for variety of bad acts).[13] The evaluation must look to prior precedent and compare the conduct and ap-

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[12] A defendant's appellate attack on the sufficiency of evidence as to malice would have to be raised in a challenge to the district judge's denial of a motion for new trial or judgment as a matter of law. This threshold sufficiency issue would not be part of the ultimate constitutional inquiry into gross excessiveness; it would implicate only issues of the controlling substantive law (usually state law in diversity cases) that define the parameters of malice.

[13] In *Gore*, for example, the Court outlined a variety of comparative factors pertinent to the fraud claim at issue there. For example, the Court noted that (1) purely economic torts are less pernicious than torts inflicting physical injury, (2) economic torts are more egregious when the target is financially vulnerable, (3) trickery and deceit are more onerous than negligence, (4) repeated conduct is more reprehensible than isolated instances of malfeasance, (5) conduct is more blameworthy if a defendant engaged in it while knowing or suspecting it was unlawful, (6) omission of material facts is less problematic than deliberate false statements, and (7) nondisclosures are less troublesome where a defendant had a good faith basis for believing that no duty to disclose existed. *Gore*, 517 U.S. at 576-80. A host of additional factors would have to be identified for other types of torts.

proved punitive damage awards therein with the defendant's conduct and punitive award in the case at bar.

Appellate judges are better positioned to assess these *Gore* guideposts than are their district court counterparts. *See Miller v. Fenton*, 474 U.S. 104, 114 (1985) (selection of the proper standard of review often turns on determination of which judicial actor is best positioned to decide the issue in question). Trial judges' principal contribution is to evaluate demeanor and credibility in the factfinding process, concerns that play no role in the constitutional excessiveness calculus. That constitutional analysis calls for no separate findings of fact, but merely involves the application of *established* facts (viewed in a light most favorable to the plaintiff) to the applicable constitutional principles. It is the courts of appeals that have been regarded as most ideally suited to decide such legal issues.[14] *See Salve Regina College v. Russell*, 499 U.S. 225, 231-32 (1991).

B. Legal Issues Are Nearly Always Reviewed *De Novo* By Appellate Courts

Appellate courts customarily review legal questions under a *de novo* standard. *Id.* at 231-33. While a trial court's findings of fact are traditionally accorded deference, and thus are not set aside unless "clearly erroneous," Fed. R. Civ. P. 52(a) (civil cases); *Maine v. Taylor*, 477 U.S. 131, 145 (1986) (criminal cases), its legal conclusions, with only rare

[14] Petitioner does not suggest that trial judges are endowed with insufficient competence to resolve non-fact intensive constitutional issues. Indeed, district courts must take on such legal inquiries in the first instance and must do so with diligence. But, at least with respect to the constitutional gross excessiveness analysis at issue here, district judges have no institutional advantage that would justify any deference in an appellate court's review of their legal conclusions.

exceptions, are evaluated by the circuit in plenary fashion. *Salve Regina College*, 499 U.S. at 231-32. Under this *de novo* standard, courts of appeals must "make an independent determination of the [legal] issues" in controversy. *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967).

The determination whether a particular punitive damage award is so grossly excessive as to violate the Due Process Clause is best characterized as a mixed question of law and fact. *See Pullman-Standard v. Swint*, 456 U.S. 273, 290 n.19 (1982) (defining mixed question as one in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether . . . the rule of law as applied to the established facts is or is not violated"). This Court typically has subjected such questions to the same degree of *de novo* review as pure legal matters in order that appellate courts may refine the governing precedent and expound upon the legal values at issue through an evolutionary process of case-by-case adjudication. *See Thompson v. Keohane*, 516 U.S. 99, 109-10 & 115-16 (1995); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 502 (1984).[15]

As this Court recognized in *Salve Regina College*, courts of appeals "are structurally suited to the collaborative juridicial process that promotes decisional accuracy." 499 U.S. at 232. The record having been fully developed below, appellate judges, sitting in panels that facilitate both reflective dialogue and collective judgment, are able to devote their full attention to legal issues. *Id.* This "[i]ndependent appellate review of legal issues best serves the dual goals of doc-

[15] Although this Court did not articulate any standard of review, its extraordinarily detailed examination of the established facts in *Gore*, *TXO Production Corp.*, and *Haslip* to determine if the punitive awards therein contravened the Due Process Clause suggests an implicit approval of a *de novo* standard. There is nary a hint in those decisions of deference to the district judge.

trinal coherence and economy of judicial administration." *Id.* at 231.

Importantly, the constitutional limits on excessive punitive damage awards can only be enforced adequately if the governing standards are clarified over time, ultimately creating a cogent body of law. *See Thompson*, 516 U.S. at 115-16; *Bose*, 466 U.S. at 502. The role of appellate courts in developing such a template is obviously critical because only appellate decisions carry binding precedential value. The jurisprudence emanating from their independent review will allow subsequent courts to distill greater meaning from the relatively abstract factors articulated in *Gore* and thereby promote a heightened degree of rationality and predictability in punitive awards.

To be sure, there is an inevitable degree of imprecision in calculating the maximum constitutionally permissible punitive damages in any particular case. It is exactly this difficulty in measuring gross excessiveness, however, that most highlights the need for a centralized application of constitutional principles to similarly situated defendants. Indeed, assuming there is independent appellate review, a rough scale eventually will emerge to give structure to the due process inquiry and thereby minimize the prospects for confusion and arbitrariness. *See Ornelas v. United States*, 517 U.S. 690, 698 (1996). The construction of this mosaic, tile by tile, is best calculated to inoculate defendants from entirely irrational punitive damage verdicts.

C. Constitutional Issues Demand Independent Appellate Review

Adoption of a *de novo* review standard in due process challenges to punitive damage awards adheres to this Court's longstanding policy of mandating independent appellate review on nearly all questions relating to the scope of fundamental constitutional rights. The Court, for example, has

spoken of independent review in the context of examining Due Process Clause claims as nothing less than a "duty of constitutional adjudication." *Haynes v. Washington*, 373 U.S. 503, 515 (1963). Similarly, in rejecting deference to trial courts on First Amendment challenges, the Court has stated that the constitutional nature of the precepts at stake render it imperative that their proper application be entrusted to appellate judges, the actors most competent to ensure the safeguarding of such rights. *Bose Corp.*, 466 U.S. at 502.

In this regard, *de novo* review is essential "if appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas*, 517 U.S. at 697. Indeed, the exercise of this decisional authority is the very "process through which the rule itself evolves and its integrity is maintained." *Bose*, 466 U.S. at 503. Most constitutional issues—due process attacks on the excessiveness of punitive damage awards in particular—acquire content only through application. As the "expositor of law" in these situations, *Miller*, 474 U.S. at 114, appellate courts are able to shape the governing jurisprudence and mold its contours only by uniformly applying a meaningful standard of review to the full array of factual scenarios. *Ornelas*, 517 U.S. at 697-98. To be sure, factual distinctions in individual cases may well limit the precedential value of any particular decision; nevertheless, appellate court opinions, when viewed collectively, will complement each other and "add to the body of law on the subject." *Id.* at 698.

A virtually unbroken line of Supreme Court precedent illuminates this understanding. Just three Terms ago, in a case remarkably similar to the instant action, the Court addressed whether a criminal forfeiture imposed upon a defendant contravened the Excessive Fines Clause of the Eighth Amendment. *See United States v. Bajakajian*, 524 U.S. 321 (1998). The analysis it undertook there entailed a comparison of the amount of the forfeiture to the gravity of the defendant's offense, an inquiry guided by many of the same factors deemed critical in *Gore* to the gross excessiveness assessment of punitive damage awards. *Id.* at 336. Although

the Court conceded that the proportionality examination is "inherently imprecise," it explicitly rejected abuse of discretion review. *Id.* at 336-37 & n.10. The Court held that "the question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate."[16] *Id.* at 336-37 n.10.

The Court employed the same reasoning in *Solem v. Helm*, 463 U.S. 277 (1983), in examining whether a criminal defendant's sentence was sufficiently excessive to violate the Eighth Amendment's Cruel and Unusual Punishment Clause. It held at the outset that a criminal sentence must be proportionate to the crime for which a defendant was convicted. *Id.* at 290. The Court then adopted several objective criteria to guide this proportionality determination: the gravity of the offense and the harshness of the penalty; the sentences imposed on other criminals in the same jurisdiction; and the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 292. In broaching the applicable standard of appellate review, the Court emphasized that trial judges ordinarily enjoy wide latitude in sentencing matters, and it is not the role of appellate tribunals to substitute their own judgment for that of the trial court. *Id.* at 290 & n.16. But there is a *constitutional* threshold on the severity of sentences, and, when that constitutional inquiry is in play, the Court implicitly admonished courts of appeals to determine

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[16] Although never explicitly addressing the standard of review in such cases, the Court's precedent on Excessive Fines Clause challenges to *civil* penalties also appears to treat the issue as one of law, subject to independent appellate review. *See St. Louis, Iron, Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915); *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 350-51 (1913); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909); *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78-79 (1907).

de novo whether the line has been crossed. *See id.* at 290-303 & n.16.

The Court's decision in *Ornelas*, *supra*, in which it adopted a standard of independent appellate review for determining the presence of reasonable suspicion and probable cause in Fourth Amendment challenges, supports a *de novo* standard here as well. The Court there began by noting that reasonable suspicion and probable cause are "fluid concepts" that derive substantive content only from the unique contexts in which they are assessed. *Ornelas*, 517 U.S. at 696. Although district court historical fact determinations may be entitled to some deference, *id.* at 699, the Court flatly rejected anything less than *de novo* review of a trial judge's ultimate constitutional holding. *Id.* at 697. In language no less fitting here, the Court concluded:

> A policy of sweeping deference would permit, in the absence of any significant difference in the facts, the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause. Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.

Id. (citation omitted); *accord Ker v. California*, 374 U.S. 23, 34 (1963) ("While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of *constitutional* rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether . . . the fundamental—*i.e.*, constitutional—criteria established by this Court have been respected.") (emphasis added).

These identical principles also guide the Court's habeas corpus jurisprudence. While it is firmly established in such cases—both through judicial precedent and subsequent

statutory codification—that state court factual findings are entitled to a presumption of correctness,[17] *Miller v. Fenton*, 474 U.S. 104, 111 (1985), this Court has consistently treated the mixed-fact-and-law *constitutional* issues arising therein as matters requiring *de novo* review at the federal appellate level.

In *Thompson*, *supra*, for example, the Court held that a state court's determination as to whether a suspect was "in custody" for purposes of *Miranda* presents a mixed fact/law question necessitating independent federal appellate review. The Court reasoned that the application of those facts to the governing legal standard is an area in which deference has no place. *Thompson*, 516 U.S. at 112-13. *De novo* review, the Court observed, more effectively guides law enforcement, unifies precedent, and stabilizes the law. *Id.* at 115. In furtherance of this point, the Court added that "case-by-case elaboration when a *constitutional* right is implicated may more accurately be described as law declaration than as law application," *id.* at 116 (emphasis added), thus falling squarely within an appellate court's primary responsibility of defining the parameters of the law.

The same reasoning provides the anchor for this Court's invocation of a plenary appellate review standard on ultimate constitutional questions in habeas cases involving the voluntariness of a defendant's confession, *Miller*, 474 U.S. at 115-17; the effectiveness of a defendant's counsel, *Strickland v. Washington*, 466 U.S. 668, 698 (1984); the voluntariness of a defendant's waiver of his right to counsel, *Brewer v. Williams*, 430 U.S. 387, 397 & n.4 (1977); a defendant's competency to stand trial, *Drope v. Missouri*, 420 U.S. 162, 174-75 & n.10 (1975); the presence of a conflict of

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[17] These cases pre-date the April 1996 adoption of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, which statutorily altered the applicable review standards in federal habeas actions.

interest flowing from an attorney's representation of multiple defendants, *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980); and the constitutional reliability of pre-trial identification procedures, *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (per curiam). These decisions recognize that only a *de novo* standard ensures the faithful protection of fundamental rights and safeguards the role of the judiciary in maintaining constitutional order.

The due process guarantee of freedom from arbitrary deprivations of property is no less important than the constitutional protections in the criminal arena discussed above. *De novo* appellate review, therefore, is similarly demanded here as a "duty of constitutional adjudication," *Haynes*, 373 U.S. at 515, to guard against punitive damage awards that, on a meaningful application of the *Gore* factors, exceed constitutionally acceptable limits.

D. A Deferential Review Standard on the Constitutional Excessiveness Question Renders the Due Process Limitation on Punitive Damage Awards Meaningless

To be sure, the Court has employed a deferential review standard in cases where the constitutional right at issue turns almost exclusively on a trial court's assessment of demeanor and credibility. *See, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (voluntariness of defendant's consent to a warrantless search); *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986) (discriminatory intent in *voir dire* peremptory challenge); *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (presence of racial animus in legislature's adoption of statutory provision); *Wainwright v. Witt*, 469 U.S. 412, 428 (1985) (juror bias). These rulings are entirely logical given that the ultimate determinations are peculiarly within the province of the trial judge.

Similar logic explains those several occasions in which this Court has commanded the circuits to apply a deferential standard of review to district court rulings on *non-constitutional* legal issues. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (imposition of Fed. R. Civ. P. 11 sanctions); *Pierce v. Underwood*, 487 U.S. 552 (1988) (assessment of whether government's litigating position was "substantially justified" for purposes of Equal Access to Justice Act attorney fee provision); *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830 (1996) (proximate and superseding causation issues in negligence claims). Unlike the instant action, appellate review in those instances dealt with matters that were either related to the supervision of trial litigation or rooted in factual determinations, areas in which district judges have special expertise by virtue of their proximity to the proceedings. *See Cooter & Gell*, 496 U.S. at 401-02; *Pierce*, 487 U.S. at 560; *Exxon Co.*, 517 U.S. at 840-41.[18]

If, however, the interpretation of important legal protections that are *not* inextricably intertwined with district court factual findings—especially *constitutional* safeguards like the substantive due process right identified by this Court in *Gore*—is to depend on the discretion of individual trial judges, the structure necessary to translate the Constitution's

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[18] Additionally, the legal issues in controversy in those cases were relatively insignificant and unlikely to yield much law-clarifying benefits from *de novo* appellate review. *See Cooter & Gell*, 496 U.S. at 403-05 (independent appellate review would be unproductive because circuit's decision on Rule 11 issue would divine nothing more than the state of the law at some point in the past; little or no precedential value would flow therefrom); *Pierce*, 487 U.S. at 561 (significant investment of appellate resources would be wasteful where resolution of legal issue would explain "not what the law now is, but what the Government was substantially justified in believing it to have been."). The Court did remark, however, that if the legal issue had involved "substantial liability" or "substantial consequences,"—as surely a constitutional gross excessiveness question does—a more "intensive" review would have been necessary. *Pierce*, 487 U.S. at 563.

vague principles into discernible rules of law would be all but lost. The delineation of our most sacred protections would be no more clear than Justice Stewart's "I know it when I see it" test for obscenity, *see Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), a formulation that has proven to be less than satisfactory. Indeed, one could even go so far as to say that such a standard would be more reflective of rule by man, rather than by law, a notion antithetical to our constitutional framework.

The bedrock principles which support that framework demand a far more solid jurisprudential foundation than the shifting sands of discretion provide. While the Constitution retains the same meaning in the hands of different trial judges, an abuse of discretion review standard "invites divergent development of [constitutional] law among the federal trial courts," *Salve Regina College*, 499 U.S. at 234, and thereby has the untoward effect of encouraging radically different constitutional boundaries in every jurisdiction. Such an inconsonant administration of our most basic rights should not be countenanced.

Nor is *Browning-Ferris Industries of Vermont, Inc. v. Kelco-Disposal, Inc.*, 492 U.S. 257 (1989) to the contrary. The issue there was the proper standard of appellate review for evaluating punitive damage excessiveness determinations rendered by district courts, *not as a matter of constitutional law, but only in the context of discretionary Rule 59 new trial motions*. *Id.* at 278-80. The Court's adoption of an abuse of discretion standard, *id.* at 279, recognizes that most Rule 59 inquiries allow the district judge to reweigh evidence, assess witness credibility, and grant a new trial (or remittitur) if the verdict appears *in his opinion* to be against the weight of the evidence. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216-18 (1947); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). The question presented on appeal in such circumstances is thus not whether the punitive award is excessive *as a matter of law*, but, on a full review of the

trial record, whether there is a basis for the district judge's *personal opinion* as to excessiveness.[19]

Yet, precisely because such a fact-laden determination is appropriately deferential to trial judge discretion, *Browning-Ferris Industries*, 492 U.S. at 279, it lacks the coherence needed to satisfy the notice requirement that the Due Process Clause compels. As *Gore* makes clear, even punitive damage awards that a trial judge might find inoffensive under the highly discretionary standards governing Rule 59 new trial motions, could well, on an independent review of the relevant *Gore* criteria, overstep the constitutional limits for excessiveness.[20]

In the final analysis, then, *constitutional* challenges to punitive damage awards on the ground of gross excessiveness must undergo independent appellate review if the Due Process Clause is to function effectively as a bulwark against

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[19] Rule 59 new trial motions are not always wholly discretionary. A defendant could challenge a punitive damage award in such a motion on the ground that it is excessive *as a matter of law* (pursuant to either the Constitution or the controlling substantive law). The trial judge's analysis of that non-discretionary legal limitation would have to be reviewed *de novo*. While these purely legal attacks on punitive awards could, as well, be brought under Rule 50, the procedural mechanism ultimately is irrelevant. The character of the claim is what is dispositive, and its legal character points toward *de novo* appellate review as to that discrete issue.

[20] For primarily the same reasons, the highly deferential "rational factfinder standard" proposed by *Amici curiae* Erwin Chemerinsky and Arthur McEvoy at the certiorari petition stage is also inappropriate. This proposal, modeled after the test governing evidentiary sufficiency challenges to criminal convictions, *see Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (habeas); *Glasser v. United States*, 315 U.S. 60, 80 (1942) (direct appeal), would ask whether any rational trier of fact could have arrived at the jury's punitive damage award in light of the record evidence. To the extent this test can be characterized as a standard of appellate review, it is no more than abuse of discretion cloaked in *de novo* garb and should be rejected for the reasons outlined above. *Cf. TXO Prod. Corp.*, 509 U.S. at 456 (repudiating rational basis standard).

wholly arbitrary or irrational awards. Indeed, the only refuge from such verdicts is the imposition of "significant[] constrain[ts]" on the determination whether the jury's award has transcended constitutional excessiveness. *Gore*, 517 U.S. at 595 (Breyer, J., concurring). Absent some statute establishing a quantitative limitation on punitive damages, a "detailed examination" of the award is critical to cabining the inflamed passions of individual juries and trial judges. *Id.* at 595-96. According district judges vast discretion as part of the appellate inquiry removes all prospects of consistency and "invite[s] extreme results that jar one's constitutional sensibilities." *Haslip*, 499 U.S. at 18.

Under a deferential review standard, the guideposts adopted in *Gore* that "purport to channel discretion" will "not do so in fact." *Gore*, 517 U.S. at 595 (Breyer, J., concurring). Rather, the deference will invite, if not encourage, the judicial nullification of these supposedly constraining forces by embracing the type of deficient scrutiny employed by the Ninth Circuit here. The Constitution requires much more.

Petitioner does not suggest that appellate judges can somehow consult their oracle of knowledge and isolate the exact punitive award necessary to punish and deter a defendant's misconduct. But their dispassionate application of the constitutional standards governing punitive damages, accentuated by an acute awareness of similarly situated appellate courts' treatment of the issue, will, over time, develop a cogent body of law that fosters an environment of predictability and reasonableness. And as Justice Breyer has noted, it is "the uniform general treatment of similarly situated persons that is the essence of law itself." *Gore*, 517 U.S. at 587 (Breyer, J., concurring).

II. Independent Appellate Review of a District Court's Constitutional Excessiveness Determination Is Not Inconsistent with the Reexamination Clause of the Seventh Amendment

It must be emphasized here that independent appellate review of a defendant's constitutional challenge to the gross excessiveness of a punitive damage award is not constricted by the Seventh Amendment's Reexamination Clause. As Justice Holmes observed in *Southern Railway v. Bennett*, 233 U.S. 80, 87 (1914), if a jury's award of damages appears excessive as a "matter of law," the Court is free to review that award without running afoul of the Constitution.[21] In such an analysis, the Court is not reexamining any fact determined by a jury. It is "merely identif[ying] that portion of the judgment that constitutes 'unlawful excess.'" *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 443 (1996) (Stevens, J., dissenting) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

This Court's decision in *Gasperini* is not to the contrary. There *compensatory*—not *punitive*—damages were at issue. While holding that, in such circumstances, the Seventh Amendment not only permits appellate review of a district judge's denial of a motion to set aside a jury verdict as excessive, but that such scrutiny is "necessary and proper to the fair administration of justice," *id.* at 435, the Court commanded that a deferential abuse of discretion standard is to be applied. *Id.* at 435-36. Because review of the actual damage award entails some reexamination (albeit an acceptable degree) of jury fact findings, requiring appellate courts to accord some deference to the district judge—whose presence in

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[21] This principle is true regardless of whether the court is examining the award for legal excessiveness under state law or the federal Constitution. *See supra* note 19.

the courtroom offers a personal perspective not otherwise available to the circuit—broke no new ground. *See id.* at 438-39.

In contrast, punitive damages present no questions of historical or predictive fact. *Id.* at 459 (Scalia, J., dissenting). The level of such an award is thus not a "'fact' 'tried' by the jury." *Id.* Punitive damages are merely "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).[22] As one lower court noted, a punitive damage award is "not a factual determination about the degree of injury but is, rather, an almost unconstrained judgment or policy choice about the severity of the penalty to be imposed, given the jury's underlying factual determinations about the defendant's conduct." *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996).

Whether the amount awarded is so excessive as to be constitutionally unacceptable is primarily a legal question, the answer to which cannot be found in the folds of discretion. Rather, it must be determined by the court of appeals based on the legal criteria this Court outlined in *Gore*. Only *de novo* review fulfills that purpose and thus ensures that the constitutional standard will be meaningfully applied in all cases on a uniform basis.

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[22] Indeed, as Justice Scalia noted in his *Gasperini* dissent, in none of the Court's (now-abrogated) "cases holding that the Reexamination Clause prevents federal appellate review of claims of excessive damages does it appear that the damages had a truly 'punitive' component." 518 U.S. at 459. In this regard, *see, e.g.*, *St. Louis, Iron, Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648, 661 (1915); *Texas & Pac. Ry. Co. v. Hill*, 237 U.S. 208, 215 (1915); *Southern Ry. v. Bennett*, 233 U.S. 80, 87 (1914); *Herencia v. Guzman*, 219 U.S. 44, 45 (1911); *Lincoln v. Power*, 151 U.S. 436, 437-38 (1894); *Railroad Co. v. Fraloff*, 100 U.S. 24, 31-32 (1879).

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and the case remanded for the purpose of requiring the court of appeals to evaluate Petitioner's constitutional challenge to the punitive damage award under the proper standard of review.

Respectfully submitted,

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